Supreme Court, U. S.
FILED
AUG 12 1976
MICHAEL RODAK, JR., CLERK

No. 76-16

In the Supreme Court of the United States

OCTOBER TERM, 1976

CHRISTOBAL ROSARIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. On March 21, 1971, petitioner, a merchant seaman, commenced an action in the United States District Court for the Eastern District of Pennsylvania against American Export-Isbrandtsen Lines, Inc., under the Jones Act, 46 U.S.C. 688 *et seq.*, to recover damages for his injuries while employed aboard Export's vessel. Export impleaded the United States as a third-party defendant under Fed. R. Civ. P. 14 and the Federal Tort Claims Act, 28 U.S.C. 1346, seeking indemnity and contribution for an aggravation of petitioner's injury during treatment by the United States Public Health Service. The United States answered; it denied liability and did not assert any claim against petitioner. On April 4, 1974, petitioner filed a complaint against the United States captioned "PLAINTIFF'S COMPLAINT AND CROSS CLAIM

AGAINST THIRD-PARTY DEFENDANT, UNITED STATES OF AMERICA" (Pet. App. A8). The complaint alleged jurisdiction under the Tort Claims Act, and it alleged liability based upon the same acts that were the subject of Export's third-party action.

The United States moved to dismiss petitioner's complaint for failure to file the administrative claim required by 28 U.S.C. 2675(a). The district court denied the motion, holding that petitioner's complaint was a "third party action" within the meaning of Rule 14, to which the requirement of a prior administrative claim would not apply (Pet. App. A20-A25; 395 F. Supp. 1192).

Prior to trial petitioner settled with Export, leaving the United States as the sole defendant. After a trial on the merits, the district court found that negligence of the Public Health Service doctors had resulted in injuries to petitioner. It awarded him $288,648 in damages (Pet. App. A26-A59).

The United States appealed, and the court of appeals reversed. It held that petitioner had not asserted a third-party complaint against the United States, but rather had attempted to file a direct action against the United States. This direct complaint was barred, the court held, by petitioner's failure to file an administrative claim, as required by the Tort Claims Act (Pet. App. A6-A17; 531 F. 2d 1227).[1]

2. Petitioner apparently has abandoned his argument that the complaint he filed against the United States was a third-party complaint and therefore exempt from

[1]The United States also argued that petitioner's complaint is barred by the statute of limitations. The court of appeals found it unnecessary to reach this argument (Pet. App. A9 n. 4).

the requirement of a prior administrative claim. He now raises an argument that "was not briefed or argued * * * on appeal" (Pet. App. A14 n. 17), *i.e.*, that the district court had "ancillary jurisdiction" over the claim against the United States. The argument is insubstantial.

The United States has conditioned its waiver of sovereign immunity from tort suits upon the prior filing of an administrative claim. "In a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity" (*United States* v. *Testan*, No. 74-753, decided March 2, 1976, slip op. 8-9). The United States may not be sued unless Congress consents, and "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586. 28 U.S.C. 2675(a) bars a court from entertaining a suit under the Tort Claims Act "unless the claimant shall have first presented the claim to the appropriate Federal agency." This requirement stands as an absolute bar to plaintiff's lawsuit, and the court's power cannot be expanded by calling its jurisdiction "ancillary" or "pendant."[2]

In any event, this would not be an appropriate case for invoking the doctrine of ancillary jurisdiction. Once petitioner settled with the original defendant, there was no other claim before the district court to which his claim against the United States could be ancillary. See Pet. App. A15 n. 17.

[2]The cases upon which petitioner relies allow federal courts to resolve ancillary claims that otherwise would be resolved in state courts. Petitioner's claim against the United States obviously cannot be resolved in a state court or in any other federal court, in light of 28 U.S.C. 2675(a). Those cases, and the conflict among the circuits (see Pet. 7-13) on the scope of ancillary jurisdiction over third-party claims, therefore have nothing to do with this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

DOJ-1976-08